Filed 8/3/12 P. v. Bush CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GEORGE EUGENE BUSH, Defendant and Appellant.	E053837 (Super.Ct.No. FMB1000075) OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed.

Allison K. Simkin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Garrett Beaumont, and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

Using a truck stolen in one burglary, burglars broke into a second residence in Twentynine Palms. The homeowner-victim of the second residence came home to discover the burglary and found a gun safe and other personal property had been staged for later pickup by the burglars. The victim's uncle and cousin waited in their vehicle till the burglars returned in a pickup truck, contacted law enforcement, and pursued the burglars till their pickup truck went off the road and became disabled. Following shoe tracks at the scene, sheriff's deputies located defendant, George Eugene Bush, who was wearing shoes with tread matching some of the shoe tracks. Following a jury trial, defendant was convicted of residential burglary and receiving stolen property, and true findings were made on six prison priors. Defendant was sentenced to 12 years in prison and appeals.

On appeal, defendant challenges the trial court's ruling admitting evidence, pursuant to Evidence Code section 1101, subdivision (b), of the uncharged burglary during which the pickup truck, that was used to haul the loot from the charged burglary, was stolen. We affirm.

BACKGROUND

Sherry Foose and her husband lived at their residence on Monte Vista Avenue in Twentynine Palms. In February 2010, while her husband was out of town on business, Sherry went to Sacramento to visit an aunt. An uncle who lived in Twentynine Palms, William Smith, picked up Sherry on February 22, 2010, brought her home around 8:00 p.m., and helped her carry her luggage into the house.

Upon arrival at the house, Sherry and her uncle discovered the front door was unlocked, and, immediately upon entering, they noticed that the flat screen television was missing from the living room. A cursory search of the house revealed that a second television was missing from the garage, a laptop was missing from the kitchen bar, a box containing approximately $300 cash was missing from under the bed, and items of jewelry were missing from the master bath, including a white gold wedding ring with inset diamonds, some pearl earrings, a gold and pearl ring, and a gold necklace with diamonds. The approximate value of the stolen property was $8,000.

During the search, Sherry and her uncle found a cigarette in the garage, although no one in the family smokes. Motorcycles in the garage had been moved closer to the garage door. In an office located in the breezeway between the garage and the main house, Sherry and her uncle noticed that a large gun safe had been pulled towards the office door that leads out to the front of the house, near the driveway. Computer equipment in the office had been unplugged and piled on a corner of the desk. Sherry and her uncle determined that the burglars planned to return.

William took Sherry to his home because Sherry did not feel safe in her house. However, because they had left the suitcases in the house and had left the porch light on, William decided to go back to Sherry's house. William's son, Michael, accompanied William back to Sherry's house to turn off the porch light. After doing so, William and Michael parked at the end of the street, approximately a block away, and watched the house. After several hours, William and Michael saw a truck slow down, turn off its

headlights, and back into the driveway of Sherry's house. Later, they saw the truck pull out, at which point Michael called 911 as William followed the truck in an effort to get a description and license number to provide to law enforcement.

Patrol units appeared as the truck entered State Route 62. The truck made a wide turn, went over a berm along the side of the highway, became airborne, and was disabled upon impact when it landed off the roadway. It came to rest at the corner of Ivanpah[1] Avenue and State Route 62. At least one person was seen exiting the truck. A large safe was in the bed of the truck. Inside the cab of the truck was a dolly device apparently used to load the safe into the truck. Also inside the cab of the truck, was a pair of tennis shoes, a flashlight, and a pack of Camel cigarettes. Outside the front driver's-side door, deputies found a black glove hanging in a bush, a can near the tire, a screwdriver-type tool, and a baseball cap. The truck was discovered to have been stolen.

Sheriff's deputies followed shoe tracks that led southeast from where the truck became disabled, continuing south through the alley into a lot just south of one house, into a field between that house and the next house, then around that house toward Ivanpah Avenue, to the driveway of the residence of Justin Lefave. Along the route, deputies found white socks, a hat, two gloves (one inside the other) behind a bush along

[1] The street name is referred to as " Ivan Paw" in many places. In other places, the street name is spelled "Ivanpah." Witnesses described the location as being the street before Copper Mountain in the Indian Cove area of Twentynine Palms, and, after consulting a street atlas (*The Thomas Guide, Street Guide & Directory*, San Bernardino County (2002), p. 4891), we take judicial notice that the street in the area indicated is called "Ivanpah Avenue."

the path of the shoe tracks, and two sweatshirts, one inside the other. Another set of fresh tracks, different from the tracks that led to the defendant's location, appeared to have been made by someone who was barefoot, going through the alley, yards, across the street and over a block wall.

Defendant came from the area of the front door of the residence, into the driveway of the Lefave residence and was detained. Defendant initially gave deputies a false name and conflicting stories. He was wearing only a tank top and sweat pants, although it was cold outside. In his pants' pocket, deputies found two packs of cigarettes, a lighter, a pry tool/folding box cutter. Defendant was wearing shoes with a herringbone tread pattern similar to the pattern seen in the tracks that led to his location.

It was later learned that the truck had been taken from the garage of Wagemaker residence. Megan Wagemaker and her husband, a Marine, lived on Cahuilla Avenue in Twentynine Palms. Megan's husband was on deployment in Afghanistan, and while he was gone, Megan stayed with relatives in Idaho for a few months. A friend of Megan's husband was also serving overseas, and his red truck was stored in the garage of the Wagemaker residence. On February 23, 2010, while she was in Idaho, Megan was informed by the wife of the truck owner that the truck had been involved in an accident. Megan telephoned the police to find out what had happened.

On February 23, 2010, Detective Thornburg was on call and was informed of the Foose burglary and pursuit. He has been trained in shoe print comparison and determined that defendant's shoes were responsible for the shoe prints leading from the

truck to defendant's location. Detective Thornburg was also informed that the truck had been stolen from the Wagemaker residence. He went to that residence, discovering that the front security doors were open but no one was home. He entered the home and discovered an unreported burglary. Subsequently, Megan Wagemaker returned to her home from Idaho to find her house had been ransacked. Missing were her engagement ring, a big-screen television, a shower curtain, a wheelchair, an Xbox game player and two games, a laptop, and the truck.

Defendant was interviewed by Detective Thornburg after being admonished under *Miranda*.[2] After initially denying involvement, defendant indicated he knew the location of the property that had been stolen in the burglaries. Defendant agreed to participate in a "show and tell," whereby he showed the detective two locations where he had last seen the stolen items. Defendant indicated that the residence of an acquaintance known to him as "Wheelchair Dave" (David Legocki) was where he had seen the stolen items the previous night. Wheelchair Dave lived across the street from the Wagemaker residence. A warrant was obtained to search Wheelchair Dave's residence, and a three-ring binder containing Megan Wagemaker's resume was found there.

Defendant also named two other individuals, "Dave and Dusty" as being involved in the burglaries. "Dave" was David Setner, and defendant pointed out where Dave lived during the "show and tell." Detective Thornburg contacted David Setner who was found

---

2 Ref. *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

to be in possession of the diamond ring taken from the Foose house. Detective Thornburg determined that defendant was involved in both burglaries based on his knowledge of all the property taken in the first burglary. Additionally, defendant admitted that he had told a known burglar, David Setner, that the Wagemaker house was vacant because the residents were military, which he had learned from Wheelchair Dave.

Defendant was charged by way of information with residential burglary (Pen. Code, § 459, count 1), and receiving stolen property. (Pen. Code, § 496, subd. (a), count 2.) It was further alleged that he had suffered six prior felony convictions for which he had served prison terms (prison priors). (Pen. Code, § 667.5, subd. (b).) He was convicted of both counts following a jury trial, and all prison priors were found true by the jury in a separate trial. Defendant was sentenced to a term of 12 years in prison: the upper term of six years for count 1, the upper term of three years for count 2 was stayed pursuant to Penal Code section 654, and one year for each of the six prison priors. Defendant timely appealed.

DISCUSSION

The sole issue presented on appeal is a challenge to the trial court's ruling on the admissibility of the evidence of uncharged burglary (the Wagemaker residence). The trial court ruled that evidence was admissible to prove a material fact in dispute such as identity or common design or plan. Defendant contends that the two incidents are not similar, and the probative value of the evidence was outweighed by its prejudicial effect. We disagree. We review the trial court's evidentiary rulings for abuse of discretion.

(*People v. Foster* (2010) 50 Cal.4th 1301, 1328; *People v. Lopez* (2011) 198 Cal.App.4th 698, 714.)

a. **Admissibility of Evidence of Uncharged Offense**

Evidence Code section 1101, subdivision (b), provides in part that nothing prohibits the admission of evidence that a person committed a crime, civil wrong, or other act (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident), when relevant to prove some fact other than his or her disposition to commit such an act. In other words, evidence of other crimes is admissible only if relevant to prove a material fact in issue, separate from criminal propensity. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 14.)

The list of facts that may be proven by other-crimes evidence is not exclusive. (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1373.) As long as there is a direct relationship between the prior offense and an element of the charged offense, introduction of that evidence is proper. (*People v. Daniels* (1991) 52 Cal.3d 815, 857; *People v. King* (2010) 183 Cal.App.4th 1281, 1300-1301.) Thus, evidence of other crimes is admissible in cases where the evidence tending to establish the crime charged is intermixed with evidence of the other offenses. (*People v. Jackson* (1950) 36 Cal.2d 281, 285; see also *People v. Viniegra* (1982) 130 Cal.App.3d 577, 582 .)

In *People v. Malone* (1988) 47 Cal.3d 1, the trial court admitted evidence of a prior theft of a car and credit cards as an uncharged offense in a current charge of murder.

The stolen car was used to transport the victim of the charged murder to the murder scene, and the defendant used the credit cards stolen during the prior crime to purchase gas after the murder. (*Id.* at p. 18.) The Supreme Court affirmed the admissibility of the uncharged crime because the theft was intertwined with the charged crimes. (*Ibid.*) The same is true here, where the truck stolen in the course of the Wagemaker burglary was used to haul property taken during the Foose burglary.

The evidence was also admissible to show intent, and common plan or scheme, as the trial court ruled. To be admissible to show intent, the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance. (*People v. Davis* (2009) 46 Cal.4th 539, 602.) The least degree of similarity is required to prove intent or mental state. (*People v. Thomas* (2011) 52 Cal.4th 336, 355.) To be admissible to show a common scheme or plan, a greater degree of similarity is required than to show intent, and the common features must indicate the existence of a plan rather than a series of similar spontaneous acts although the plan thus revealed need not be distinctive or unusual. (*Davis,* at p. 602, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

The evidence of the Wagemaker burglary was relevant because that burglary was part of an ongoing common plan or scheme by defendant and his affiliates to burglarize homes while the owners or occupants were out of town. The similarities include the selection of unoccupied residences, the use of gloves and socks to avoid fingerprints and footprints at the scene of the crime, as well as the use of a vehicle stolen at the

Wagemaker burglary as the means of carrying the property taken from the Foose residence. Not only were the two burglaries linked as part of an ongoing burglary and fencing operation,[3] the identification of defendant through the shoeprints leading from the truck stolen during the Wagemaker burglary was highly relevant as to his identity as one of the burglars in the Foose burglary.

We also note that Evidence Code section 1101, subdivision (b) expressly permits the admission of other crimes evidence to prove *preparation* in connection with the charged crime.[4] The theft of the truck during the Wagemaker burglary facilitated the removal of property in preparation for the subsequent Foose burglary. In aiding the burglars' preparation for the Foose break-in, the evidence also demonstrated the defendant's intent to commit theft in the Foose residence, as opposed to some innocent purpose for entering the residence. Both burglaries were committed pursuant to a common plan to burglarize residences while the residents were away. The evidence was admissible under Evidence Code section 1101, subdivision (b).

---

[3] During defendant's taped interview, he described the sale of Xboxes and how Dave "hustles . . . people to buy his" stolen goods. Wheelchair Dave used defendant to find buyers for stolen Xboxes.

[4] Although the court did not expressly rule that the evidence was admissible to show preparation, we must affirm if the evidence was admissible on any ground. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145 [ruling on a motion to suppress]; *People v. Zapien* (1993) 4 Cal.4th 929, 976 [ruling on Evid. Code, § 352 objection].)

b. Probative Value vs. Prejudicial Effect of Uncharged Offenses.

Because evidence of other crimes may be highly inflammatory, the admission of the evidence must not contravene other policies limiting admission. (Evid. Code, § 352; *People v. Lewis* (2001) 25 Cal.4th 610, 637.) Under section 352, the probative value of a defendant's prior acts must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404.)

The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. (*People v. Karis* (1988) 46 Cal.3d 612, 638.) It refers to evidence which uniquely tends to evoke an emotional bias against one party as an individual and which has very little effect on the issues. (*People v. Cowan* (2010) 50 Cal.4th 401, 475; *People v. Garceau* (1993) 6 Cal.4th 140, 178.) Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. (*People v. Zapien, supra,* 4 Cal.4th at p. 958.)

Evidence is substantially more prejudicial than probative only if, broadly stated, it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome. (*People v. Eubanks* (2011) 53 Cal.4th 110, 144.) Evidence is not "unduly prejudicial" under the Evidence Code merely because it strongly implicates a defendant and casts him or her in a bad light, or merely because the defendant contests that evidence and points to allegedly contrary evidence. (*People v. Jones* (2012) 54 Cal.4th 1,

61-62.) The trial court has the discretion to admit evidence of uncharged acts after weighing the probative value against the prejudicial effect. (*People v. Butler* (2005) 127 Cal.App.4th 49, 60.) We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

Here, the evidence was not likely to evoke any emotional bias against defendant because the facts of the uncharged offense are not shocking or offensive. The evidence, while harmful to the defense theory, was not disturbing and did not tend to evoke an emotional bias against defendant. There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

RICHLI
J.

CODRINGTON
J.